In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 987

DEWEY LAWRENCE COBB, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The *per curiam* opinion of the court of appeals (Pet. App. A) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 9, 1967, and a petition for rehearing was

denied on December 6, 1967. The petition for a writ of certiorari was filed on January 4, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether, despite the lack of objection at trial, petitioner's conviction should be reversed on the ground that the prosecutor's closing argument was prejudicial.

STATEMENT

After a jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted on a one-count indictment which charged the unlawful and knowing transportation of a stolen motor vehicle in interstate commerce (18 U.S.C. 2312). On November 9, 1966, he was sentenced to imprisonment for five years.

In mid-November, 1965, a new, recently imported, green, 1965 Volkswagen sedan without license plates was stolen from a service station in Houston, Texas, which was not far from an automotive body repair shop operated by petitioner (R. 26-31, 213). Shortly thereafter, petitioner, who was accompanied by a Mr. Shaver, delivered the Volkswagen to his daughter in Shreveport, Louisiana (R. 76-77, 84, 86-87, 94). The car, at that time, had a Louisiana license plate which was subsequently found to have been issued for a 1955 Dodge (R. 127-128)—a car that had been left for repairs at petitioner's place of business in Texas in November, 1965 (R. 77, 94, 183-184). Petitioner instruct-

ed his daughter to have the car partially re-painted so that it had a white top and a bronze or gold stripe on its side (R. 78, 97-98, 115-116). The daughter never received title to the car (R. 78); petitioner said that he was going to keep the title papers himself and that he wanted to get Texas plates (R. 78, 80, 96).

At the trial petitioner testified that he had purchased the Volkswagen from George Shaver not knowing it was stolen and that Shaver furnished the Louisiana license tags and drove the Volkswagen to Shreveport, while petitioner followed in Shaver's car (R. 165-167, 185). On cross-examination petitioner admitted that he received no papers nor evidence of title, and said that, upon his inquiry, Shaver proferred incorrect Texas title papers for a 1963 Volkswagen, which petitioner rejected (R. 170, 182, 187, 199).[1] Petitioner's reason for having the car repainted was that the distinctive paint would make readily apparent any violation of his instructions to his daughter not to visit undesirable locations (R. 169). On cross-examination of the petitioner, it was brought out that he had previous convictions involving interstate transportation of stolen motor vehicles in 1949 and in 1954 (R. 193).

The defense introduced evidence of petitioner's good character (R. 201, 211, 214), and argued to the jury that petitioner had reformed and at present had a good character (R. 285).

---

[1] Shaver, when called by the defense, indicated, out of the presence of the jury, that he would claim his Fifth Amendment privilege and was excused from testifying (R. 222-228).

In closing argument, after reviewing the evidence, government counsel said (R. 298):

> It is your job now to enforce that law if you see fit. If you see fit. If the facts so indicate you can convict this man, this twice convicted car stealer, or if you see fit, you can turn him loose.
>
> I don't know about you, but I don't want to rub shoulders with this kind of people. It is your decision. You can now enforce the law or you can forget all about it and go home.

No objection to the argument was made at trial.

ARGUMENT

Petitioner argues that the quoted remarks of the prosecutor should have been deemed plain error. The court below properly declined to accept this claim. The reference, in closing argument, to petitioner's previous convictions for similar offenses was founded on evidence introduced after petitioner had taken the stand. Defense counsel had introduced evidence of petitioner's good character (R. 211, 214) and argued that petitioner "had been living right" (R. 285). The prosecution was entitled to argue to the contrary. The rhetoric as to law enforcement amounted to little more than an argument that a person who has been proved guilty ought not be acquitted. See *United States* v. *Hoffa*, 349 F.2d 20, 51 (C.A. 6), affirmed on other grounds, 385 U.S. 293. Certainly, it was not of such extreme character that it would justify reversal in the absence of objection or a request for a corrective instruction.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

FRED M. VINSON, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
EDWARD FENIG,
Attorneys.

FEBRUARY 1968

☆ U. S. GOVERNMENT PRINTING OFFICE: 1968 288817 571